2001

Rae Adamson v. Ranae Adamson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RAE ADAMSON,

Petitioner/Appellant,

-vs-

RANAE ADAMSON,

Respondent/Appellee.

REPLY BRIEF OF APPELLANT

Appellate Case No. 20010516-CA

REPLY BRIEF OF APPELLANT

Reply Brief from the Appeal of the Judgment and Order entered

in the Third Judicial District Court in and for Salt Lake County,

State of Utah, on May 18, 2001.

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PETITIONER/APPELLANT (hereinafter "Petitioner") submits the following as his reply brief to the Brief of Appellee in the above matter:

JURISDICTIONAL AUTHORITY

Jurisdiction to review the final judgment and order herein, which is the Order Denying Petition to Modify Decree of Divorce ("Order Denying Petition to Modify"), is vested in the Utah Court of Appeals, pursuant to the Rules of the Utah Court of Appeals, Rules 3 and 4, and Utah Code Annotated, §78-2a-3(2)(h).

NATURE OF THE PROCEEDING

The matter below was a trial on a petition to modify a decree of divorce, and the order appealed from is the Order Denying Petition to Modify.

STATEMENT OF THE ISSUES

The following issues are presented on appeal: The Petitioner's case is ripe for review by this Court; the lower Court did abuse its discretion in finding there was not a substantial and material change of circumstances warranting a modification of alimony; and the issue of whether or not to grant the Petitioner's requested modification is clear and should not be remanded, necessitating further costs and fees for both parties.

DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES

The following statutes and cases are dispositive of the issues outlined above: Utah Code Annotated, §30-3-5(7)(g)(i) (1998 and Supp. 2001); Bolliger v. Bolliger, 997 P.2d 903 (Utah App. 2000); Johnson v. Johnson, 855 P.2d 250 (Utah App. 1993).

STANDARD OF REVIEW

Section 30-3-5(7)(g)(i) (1998 & Supp. 2001) gives the trial court "continuing jurisdiction to make substantive changes and new orders regarding alimony based upon a substantial and material change in circumstances not foreseeable at the time of divorce."

"The determination of the trial court that there [has or has not] been a substantial change of circumstances is presumed valid." Bolliger v. Bolliger, 997 P.2d 903, 906 (Utah App. 2000). The Appellate Court reviews "the ruling under an abuse of discretion standard." Id.

STATEMENT OF THE CASE

Inasmuch as Respondent has admitted and relied in her responsive brief on Petitioner's Statement of the Case, the Petitioner will reference the same Statement of the Case from the original Appellate Brief in this Reply Brief. Petitioner relies on his original Statement of the Facts and does not dispute the veracity of the Respondent's Statement of the Facts, except to

point out that the Statement of the Facts is short and lacks highly relevant facts found in Petitioner's original Statement of the Facts in the Brief of Appellant.

SUMMARY OF THE ARGUMENT

Respondent's contention that the Petitioner's pending retirement was not an issue ripe for adjudication is incorrect. Respondent's own summary of the argument states, "The Utah Supreme Court notes that when parties find themselves in a position that **may** some time in the future happen, this question is not ripe before the court for adjudication." Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981) (emphasis added). The Supreme Court is referencing issues that may happen in the sense that they are speculative and not within the control of any party to make happen. The Petitioner has control of his ability to retire; however, he is choosing not to, so that he can meet his needs and pay his monthly alimony obligation to Respondent. The Respondent's use of the word "ripeness" is taken out of context. The Respondent would have this Court believe that Petitioner must immediately injure himself economically prior to seeking relief from the courts. The inability of the Petitioner to retire is, in fact, the injury and the issue that is ripe for adjudication at this time.

The Respondent's contention that the original trial court took Petitioner's future retirement into consideration in issuing an alimony award is incorrect. The lower court could not infer that, at the time of divorce, the original trial court contemplated the parties' retirement in making its award of alimony. Bolliger v. Bolliger, 997 P.2d 903, 908 (Utah App. 2000). Furthermore, Johnson v. Johnson, 855 P.2d 250 (Utah App. 1993), states that whether or not a trial court made adequate findings that it foresaw a party's retirement in making an original alimony award could not be determined by simply noting that the original Decree allocated retirement benefits between the parties. Id. at 253. It is wrong for Respondent to imply that,

because the original trial court specifically addressed the Petitioner's retirement and the Respondent's on-going financial hardships, the original court meant for the award of alimony to be unmodified upon Petitioner's retirement.

Respondent's claim that the Bolliger case is distinguishable from the case at bar merely because the moving party in Bolliger had an "unexpected early retirement" misstates the case. Nowhere in Bolliger did the fact that the moving party's retirement was "unexpected" impact the reasoning of the appellate court. The fact that the moving party's retirement in that case was unexpected is merely stated in the recitation of facts and is not a fact upon which the Bolliger decision turned.

The Court of Appeals need not remand this case as the findings are clear from the trial court that, if a substantial and material change of circumstances had been found, the court would have modified the award of alimony. As the judge in the trial court stated, the Respondent would be "better off" were the Petitioner to retire. Neither party should incur on-going expenses of remanding this case when, if the Petitioner's Appeal is granted, the result is obvious that Petitioner should be allowed to retire and to have the alimony obligation terminate.

ARGUMENT

POINT 1. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S PETITION TO MODIFY.

While the Respondent is correct in stating that Petitioner was almost 66 years old when his Petition to Modify came on before the trial court, and that the Petitioner had not yet retired, the remaining argument of Respondent regarding ripeness is fundamentally flawed. The Respondent goes to great length, citing the case of Adelman v. Adelman, 815 P.2d 741 (Utah

App. 1991), arguing that Petitioner's issue is not ripe. However, the case at bar is easily distinguishable from Adelman. In that case, the court was dealing with survivor benefits that might be reinstated if the spouse were to seek divorce from her current husband. In Adelman, no evidence was before the court that the spouse was in fact seeking a divorce, or had any desire to seek a divorce from her current spouse. Thus, the issues of the potential retirement in Adelman were complete speculations. In the case at bar, the Petitioner's retirement is not speculative. He is absolutely entitled to his benefits upon retirement; so is Respondent. That cannot change. He is past retirement age. It is the Petitioner's inability to retire that is the immediate concern. Every other employee working for the State of Utah, who has attained the Petitioner's current age, has the right to retire. Thus, the injury to the Petitioner is real, tangible, and on-going, i.e., it is ripe. Contrasting this is Adelman, where there was no evidence that the spouse seeking potential survivor benefits had a desire to seek a divorce from her current husband. It is clear that the case at bar is very different.

Ripeness is about options: whether to do a thing or whether not to do a thing. In the case at bar, Petitioner has no options. He must not retire; otherwise, he will suffer economically. Examples given by Respondent show nothing but options--whether a spouse is going to decide to become divorced, or not to become divorced; or whether an individual wishes to commit a crime or not to commit a crime. In the case at bar, the injury is already being done to Petitioner–he cannot retire, though he is absolutely entitled to do so.

Furthermore, the Respondent has failed to cite anywhere on the record where the trial court specifically stated that the denial of the Petition to Modify was due to ripeness. The Petitioner quotes the Order Denying Petition to Modify, at ¶16, where it states:

> The Petitioner has not retired from his employment, to date, despite his eligibility to do so, because he alleges he is concerned that the obligation to pay alimony will continue past his retirement, and he is concerned that he will be unable to meet his expenses on a reduced income from retirement, if the alimony obligation continues.

Order Denying Petition to Modify, at ¶16. This says nothing of ripeness. It says merely that Petitioner's inability to retire had reached a level of concern that he sought a petition to modify. Furthermore, Respondent quotes Boyle, et al. v. National Fire Insurance Company, 866 P.2d 597 (Utah App. 1993), stating "where there exists more than a difference of opinion regarding the hypothetical application of [insurance provision] to a situation which the parties might, at some future time, find themselves, the questions are ripe for adjudication." Id. In the case here, there is no hypothetical situation. The Petitioner is being barred from retirement. The Petitioner desires to retire immediately. The only question is whether this Court will allow him to terminate his alimony obligation if he retires. There is no "hypothetical" situation where mere "opinion" differs regarding a situation which might at some future time occur. The situation is present and the issue is most assuredly ripe.

POINT 2. PETITIONER HAS SHOWN A SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES.

The facts of this case do not support the trial court's finding of a lack of substantial and material change in circumstances. For reasons as outlined in the original Brief of Appellant, the trial court is specifically barred from finding that the mere mention of retirement benefits in the original Decree of Divorce and allocation of retirement benefits necessitate a finding that the trial court contemplated the Petitioner's retirement in making its award of alimony. The fact that the original trial court stated that the alimony award was to be "permanent" does not mean

that it meant for the award of alimony to be non-modifiable. This has been well briefed in the original Brief of Appellant and has not been refuted by the Respondent.

The Respondent's argument flies in the face of the reasoning stated in Bolliger that, just because the Decree calls the alimony award permanent, it does not mean the award of alimony is non-modifiable. See Bolliger at 908.

Furthermore, as has been stated in the Brief of Appellant and upheld in Johnson v. Johnson, 855. P.2d 250 (Utah App. 1993), a mere allocation of retirement benefits by a trial court does not mean that the trial court contemplated retirement be paid in conjunction with alimony.

> Since the trial court in the instant case [Johnson] divided the pension plan between the parties, it was cognizant of Mrs. Johnson's ability to receive additional income in the future that would alter her financial condition and needs. Thus, . . . Mrs. Johnson could argue that her receipt of retirement benefits was an anticipated event and the trial court considered it when making the alimony award. Therefore, Mrs. Johnson's receipt of retirement benefits might not be considered a material change in circumstances. Id. at 253.
>
> We do not believe it makes for good law and sound policy to have parties arguing years after the fact over what a trial may or may not have considered when making an alimony award. Id.

As has been previously stated in the Brief of Appellant, this speculation is exactly the type of speculation engaged in by the trial court below.

The Respondent would have this Court engage in exactly that type of speculation now. The Respondent stated in her brief, on page 13, that "The Court clearly recognized that Respondent would have a difficult time in paying her support obligation in that it stated, '[i]n any month when the [respondent] fails to make an actual monetary payment to [petitioner] for child support, the child support shall be deducted from [respondent's] lien upon the marital

residence of the parties.'" This is an attempt by Respondent to entice this Court to speculate what the original trial court meant by that language. The only thing that we can safely say the original trial court meant by that language is that the Respondent was not likely going to pay child support to Petitioner at that time, and that if she failed to do so, her child support should be deducted from her lien upon the marital residence. This may be as much a finding about Respondent's character as it is a finding about her financial condition.

The marital residence of the parties has nothing to do with alimony due Respondent, nor the retirement benefits of Petitioner, and is wholly irrelevant to the discussion at bar.

The point the Johnson court made is that speculation is not what we want when we are deciding whether or not a change was "foreseeable" for purposes of modifying a decree of divorce. If it was foreseeable, it should have been stated specifically by the first trial court. This means that this Court should not have to read several sections of an old decree that may or may not be completely unrelated to one another, and extrapolate from them, in order to devine the intention of the court in making that order.

POINT 3: THE LAW OF MODIFICATION DOES NOT REQUIRE THAT A CHANGE IN CIRCUMSTANCES BE UNEXPECTED OR NOT CONTEMPLATED AT THE TIME OF DECREE OF DIVORCE.

On page 15 of Appellee's Brief, Appellee goes to great length to state that there is an additional fact in the Bolliger case not found in the case at bar, that the husband was ordered to pay alimony based on his petition to modify the decree due to his "unexpected early retirement." Id. at 905. Respondent would have this Court believe that the foreseeability of Petitioner's desire to retire makes this case substantially distinguishable from Bolliger. However, what Respondent does not divulge to this Court is the fact that the husband in

Bolliger was forced to retire because of unexpected circumstances. Indeed, the trial court states specifically that "to succeed on a petition to modify a decree of divorce, the moving party must first show that a substantial and material change of circumstances has occurred" since the entry of decree of divorce and "not contemplated **in the decree itself**." Id. at 906, citing Durfee v. Durfee, 796 P.2d 716, 717 (Utah App. 1990) (emphasis added).

The key language in the above quote is the emphasized portion, "in the decree itself." The court in Bolliger relied upon this, as opposed to the retirement being "unexpected." Utah law allows for modifications in near-miss circumstances that can be reasonably expected, such as an individual who applies for a better job and feels confident that he might get that job. The fact that the individual did not unexpectedly seek and obtain better employment does not prevent his former spouse from petitioning to modify the decree of divorce based upon new income gained by her former spouse achieving new employment. Then, the Bolliger court goes on to state that:

> The fact that the parties may have anticipated [a substantial material change in circumstances] in their own minds or in their discussions does not mean that the decree itself contemplates the change. In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change.

Id. at 906, citing Durfee v. Durfee, 796 P.2d at 716.

> Accordingly, if both the divorce decree and the record are bereft of any reference to the change to its circumstance at issue in the petition to modify, then the subsequent change to circumstance was not contemplated in the original decree.

Id. The Bolliger case even goes a step further in referencing the standard laid out in Johnson, saying that "This Court noted that the trial court did not make findings regarding the plaintiff's

receipt of future income from the pension plan and how that would affect her need for alimony." Id. at 907. Nowhere in the court's reasoning is the fact that the husband in Bolliger had an "unexpected early retirement" material to that court's decision. The standard laid out in Bolliger is bereft of anything that would indicate the Court here should deny a petition to modify simply because the retirement of a party is expected.

The argument of Respondent and the lower court finding that the original trial court alimony award is "permanent," and thus should not be modified, is fundamentally flawed. It is worth noting that at the time of the parties' original Divorce Decree (1989), Utah Code Annotated, §30-3-5(8), had not been adopted stating that an award of alimony was generally limited by the number of years the parties had been married. Thus, it was common at that time for judges to make awards of alimony "permanent" when what they really meant was that the facts merited awarding more than "temporary" alimony. (See Higley v. Higley, 626 P.2d 379 (Utah 1983).

Leading case law in this area is Jones v. Jones, 700 P.2d 1072 (Utah 1985). As was stated in Jones, "the trial court has broad latitude in such matters [payment of alimony], and orders distributing property and setting alimony will not be lightly disturbed." Id. at 1075, citing Higley v. Higley, 676 P.2d 379, 382 (Utah 1983); Dority v. Dority, 645 P.2d 56, 59 (Utah 1982); English v. English, 565 P.2d 409, 410 (Utah 1977).

In Jones, the husband and wife had been married for twenty years during which time the wife had been primarily a stay-at-home wife and had developed a few marketable job skills. The husband worked and earned approximately $90,000.00 annually. The trial court entered an award of alimony granting the wife monthly alimony of $1,000.00 for five years, $750.00 for five additional years and $500.00 per month thereafter. The appellate court found that the trial

court had wholly failed to follow the standards as outlined in English v. English, 565 P.2d at 411, in fixing a reasonable award of alimony. Those factors are as follows: (1) financial conditions and needs of the wife; (2) the ability of the wife to produce a sufficient income for herself; and (3) the ability of the husband to provide support. Id. at 411-12. Nowhere in that case does it mention the length of years of the marriage which was a substantive statutory provision. Further, the court, in Jones, found the arbitrary drops in alimony every five years to be an abuse of discretion when the court had failed to state a specific reason for doing so grounded in the facts of the case. Jones, at 1075. Therefore, when trial courts after 1985 have made awards of alimony and stated that they were "permanent," they did not mean that the award of alimony was non-modifiable or non-reviewable. They simply meant that they had fixed no date certain upon which the alimony was to terminate, leaving that to the trial court to decide on a petition to modify, as was required by Jones. Thus, the Respondent's argument that the award of alimony is non-modifiable because it was called "permanent" is inaccurate and is not in keeping with Utah law in force at the time. Prior to the current enactment of Utah Code Annotated, §30-3-5(8), alimony of any limited number of years was called "temporary" alimony. See, generally, Olsen v. Olsen, 704 P.2d 564 (Utah 1985); Huck v. Huck, 734 P.2d 417 (Utah 1986); Barber v. Barber, 792 P.2d 134 (Utah App. 1990); and Higley v. Higley, 676 P.2d 379 (Utah 1983).

The Higley case is particularly illustrative of Petitioner's point, as it involves both temporary and permanent alimony. In that case, the court stated as follows:

> The trial court in this action granted a divorce to each party, divided their property almost equally, awarded the appellant temporary alimony for three years in an amount equivalent to the house and utilities payments and awarded the appellant permanent alimony thereafter of $100 per month. The appellant

> claims that the trial court abused its discretion in the granting of a divorce to Respondent and in the awarding of alimony. Her first argument is without merit, but we reverse and remand that portion of the decree dealing with alimony. This Court has set forth numerous criteria to be used in determining a reasonable alimony award. In light of our precedents and the absence of a specific finding regarding the appellant's present or future ability to work, the trial court's $100 per month permanent alimony award was, in our opinion, an abuse of discretion. Although we affirm the temporary alimony award, we reverse and remand the permanent alimony award for additional findings and possible modification.

Id. at 380. Respondent would have this Court believe that were the Higley court to have also divided retirement assets, neither party could seek a modification of the alimony award after the retirement of either party simply because the court called the alimony award "permanent."

In 1989, a trial judge could be summarily reversed for limiting the duration of alimony at **all**.

POINT 4: NO REMAND IS NECESSARY FOR MORE SPECIFIC FINANCIAL FINDINGS.

The Respondent relies primarily on the case of Moon v. Moon, 973 P.2d 431 (Utah 1999), in making her argument that the trial court should re-hear the matters of the parties' current financial situation. However, it is interesting to note that the Respondent goes on at great length to support Petitioner's argument that the alimony award should be terminated, in citing Williamson v. Williamson, 983 P.2d 1103 (Utah App. 1999) and Munns v. Munns, 790 P.2d 116 (Utah App. 1990), to show that there is sufficient basis to terminate the alimony award. The trial court here has previously made the finding that, were the Petitioner to retire, the Respondent would be better off financially. The trial court stated:

> [Respondent's] better off if [petitioner] retires, though. [Petitioner's counsel] is right. [Respondent] is going to qualify for social security, and that's going to happen whether he retires or

> not, but her percentage of his retirement should be close to two and one-half, three times the amount of alimony that she receives under the alimony [sic]. So, if I show that they haven't shown a material change in circumstances and the petition is denied, and he chooses to continue working because of that, she's in worse shape than if he retires, even if they say he doesn't have to pay alimony anymore. The numbers can't be argued with.

(ROT at 51, lines 5-14). Clearly, the judge was referencing specific financial information that was submitted by both parties in arriving at this determination, and had decided that the Respondent would not only be better off, but would be receiving two-and-one-half to three times more than what she was to receive under the status quo.

Furthermore, the Respondent is taking the Moon case out of context when Respondent states that: "The trial court should consider evidence of the parties' financial situation, as their circumstances . . . may have changed during this Appeal." Id. at 438. The Appellate Court in that case was going to great length to emphasize that the trial court in Moon had failed wholly to give any findings in support of its ruling. What the court emphasized is that the parties, in Moon, needed to have their full financial status explored and analyzed by the trial court prior to making any award of alimony or denying any petition to modify alimony. The Court of Appeals, in Moon, would have remanded based on that lack of detailed findings regarding the finances alone, regardless of the amount of time that had passed while the case was waiting to be heard on appeal.

What the Moon case really stands for is that the trial court must, even if it makes a finding of a substantial change in circumstances, consider what the parties' needs are, the ability to meet their needs, and the payor spouse's ability to pay, prior to making any order on alimony. It failed to do so in that case.

As Respondent states in her brief, "The Petitioner has not retired, Respondent has not applied for social security benefits, and the trial court itself notes in its Findings several times that it approximates the parties' future financial positions." (Brief of Appellee, at page 18). The Respondent essentially admits that there has been no material change in circumstances that was not considered by the court below at the trial appealed from. Further, the trial court was only "approximating" what the financial positions would be within days after the Petitioner retired, had the trial court allowed him to do so by granting his Petition to Modify. Petitioner would have retired at the conclusion of the trial; the Respondent would have applied for and received her benefits shortly thereafter; and she would have had more money. The trial court would not have been making an overly-speculative award based on a future event. Furthermore, both parties' counsel provided the trial court with completed and current financial declarations, tax returns and other financial information with which to make its decision.

Further, no new determination should be allowed, as to do so would be the same as granting Respondent an untimely motion for a new trial regarding the parties' financial status.

The trial court has clearly stated what its decision would be were it to find a substantial and material change in circumstances not contemplated in the original Decree, and this Court of Appeals should enter that judgment. No need for remand exists in this case. Both parties to this action have limited financial means with which to continue if this matter is remanded. This Court should enter judgment in favor of Petitioner, modifying the Decree of Divorce, terminating the alimony effective upon Petitioner's retirement.

POINT 5: RESPONDENT IS NOT ENTITLED TO COSTS AND FEES ON THIS APPEAL BECAUSE PETITIONER'S APPEAL IS NECESSARY TO CORRECT THE CLEAR ERROR OF THE LOWER COURT.

It is common Utah case law that a party who was awarded fees in a lower court and prevails on appeal should, likewise, be awarded fees on appeal. In Watson v. Watson, 837 P.2d 1, at 23-24:

> Ordinarily, when fees in a divorce have been awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal. (Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991) (quoting Burt. v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990)). In the case at bar, Mrs. Watson was awarded attorney fees below and has prevailed on appeal. Further, Mr. Watson has not demonstrated why we should diverge from the general rule; therefore, we award Mrs. Watson reasonable attorney fees in appeal.

In the instant case, neither party was awarded attorney fees in the lower court, and, therefore, neither party should be awarded fees on appeal. The Respondent's argument that Petitioner should be ordered to pay Respondent's fees, because he has been unable to abide by the trial court's judgment, should be denied based upon the Respondent's need to have this matter reviewed on appeal. Clearly, the trial court in this case is not following the well-established Utah case law, and Utah Code Annotated, §30-3-5. Therefore, Respondent should not be required to pay fees to have the decision corrected merely because the Respondent is alleging that Petitioner is failing to follow a court order which has been improperly entered.

Further, the Respondent comes to this Court with unclean hands in her request for fees. Respondent, as pointed out in her brief, had a long history of consistently refusing to pay child support to Petitioner since the parties' divorce. Thus, her request for fees on appeal should be denied.

CONCLUSION

Petitioner's original arguments for appeal stand unrefuted by the Respondent. This case is ripe for adjudication.

No remand is necessary in this case, as the trial court has already determined that based upon its Findings and the review of all the financial information pertinent to this decision, the Respondent would be better off were the Petitioner to be allowed to retire and cease paying Respondent alimony. Respondent never appealed to this Court for a review of the trial court's financial findings and its determination that Respondent would be "better off" if Petitioner were allowed to retire. Therefore, this Court should find there has been a substantial and material change in circumstances and enter judgment granting Petitioner his Petition to Modify, terminating the alimony award to Respondent, effective upon Petitioner's retirement.

Respondent was denied her fees from Petitioner at trial of the Petition to Modify and should, for reasons stated above, be denied her fees on appeal.

RESPECTFULLY SUBMITTED this 16 day of July, 2002.

CORPORON & WILLIAMS, P.C.

MARY C. CORPORON
MARY CLINE
JARROD H. JENNINGS
Attorneys for Petitioner/Appellant

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I caused two (2) true and correct copies of the foregoing to be mailed to:

NATHAN PACE
Attorney for Respondent
136 South Main, #404
Salt Lake City, Utah 84101

on this 10th day of July, 2002.

Diane Romero
Secretary

Exhibit “A”

*792 P.2d 134, *; 134 Utah Adv. Rep. 26;*
*1990 Utah App. LEXIS 86, **

Anita L. BARBER (Dumesnil), Plaintiff and Appellant, v. Eugene L. BARBER, Defendant and Appellee

Case No. 880615-CA

Court of Appeals of Utah

792 P.2d 134; 134 Utah Adv. Rep. 26; 1990 Utah App. LEXIS 86

May 14, 1990, Filed

IOR HISTORY:

***1]** Third District, Salt Lake County; The Honorable Pat B. Brian.

RE TERMS: furniture, divorce, separate property, termination, temporary alimony, replaced, abitation, alimony, bought, equitable division, clearly erroneous, premarital, personal property, property sion, marriage, married, decree, chair

JNSEL: Richard L. Bird, Jr., Salt Lake City, for Appellant.

nie L. Mower, Salt Lake City, for Appellee.

GES: Richard C. Davidson, Judge. Norman H. Jackson, Judge, John Farr Larson, n1 Judge, concur.

ohn Farr Larson, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code § 78-3-24(10) (Supp. 1989).

NIONBY: DAVIDSON

NION: [*135] Anita L. Barber appeals from the property division of her divorce from Eugene Barber from the court's termination of **temporary alimony.** We affirm.

and Eugene became acquainted in 1976. Anita owned a house at the time, which had been awarded r in an earlier divorce. In December 1976, Eugene and his children moved into the house with Anita. out that time, Eugene finished the basement and constructed a patio deck with the help of Anita's . He also improved the landscaping and bought some new furniture, some of which replaced part of 's furniture. There was no discussion between the parties about their legal rights in relation to these ovements, although at one point after the improvements were made, Anita refused to put the house in tenancy.

ughout **[**2]** the parties' relationship, the greater part of the household expenses, including the mortgage, were paid by Eugene. Anita has relatively few employment skills and little work ience. She was employed at the time of trial, but only occasionally during the marriage did she work de the home. She received alimony from her prior husband until 1978, and she also received child ort for her children.

living together for about two years, Anita and Eugene were married in November 1978. They had no en from their union, but both had children from their prior marriages. They separated in August 1983, nita began living with another man. Despite a rather heated evidentiary dispute about when this itation began, some evidence indicated, and the trial court found, that it began in the fall of 1983.

Anita filed for divorce in May 1984. The case was tried in March 1985, but Eugene failed to appear. The court nevertheless heard testimony from Anita, granted a divorce, awarded **temporary alimony,** and reserved the issues of permanent alimony, property, and attorney fees. A subsequent evidentiary hearing was held in 1987, after which Anita moved to again reopen and introduce **[**3]** evidence of the parties' financial condition, but her motion was denied. After lengthy disputation over the details of the findings, the wording of the decree, and the specifics of the personal property **[*136]** distribution, a decree was finally entered. Anita appeals.

Anita's principal n2 arguments on appeal are: (1) the improvements to her home by her then husband-to-be became her separate property, and the trial court could not equitably divide that property in the later divorce; (2) the property division is inequitable because it fails to take into consideration the fact that the furniture Eugene bought replaced equivalent furniture of Anita's; and (3) the final decree terminates **temporary alimony** prematurely.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Anita included in her brief additional arguments on evidence, unfair prejudice by the trial judge, and other matters. These arguments clearly lack merit and do not warrant discussion in this opinion. *See* State v. Carter, 776 P.2d 886, 888 (Utah 1989).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Anita's first argument is premised on holdings in cases **[**4]** such as Layton v. Layton, 777 P.2d 504, 505 (Utah Ct. App. 1989), and *Mattes v. Olearain,* 759 P.2d 1177, 1181 (Utah Ct. App. 1988), in which we concluded that, under pre-1987 law, n3 the property of unmarried cohabitants is not subject to equitable distribution as in cases of divorce. However, Anita's argument completely ignores the fact that these parties were eventually married, and it is well-settled that premarital or separate property may, under proper circumstances, be subject to equitable division upon divorce. n4 Anita also fails to show how the improvements that Eugene made to the house became her separate property. Anita clearly does not establish the essential premises of her reliance on *Layton* and *Mattes.*

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 For current law, *see* Utah Code Ann. § 30-1-4.5 (1989).

n4 *Noble v. Noble,* 761 P.2d 1369, 1373 (Utah 1988); *Mortensen v. Mortensen,* 760 P.2d 304, 308 (Utah 1988); *Burke v. Burke,* 733 P.2d 133 (Utah 1987); *Painter v. Painter,* 752 P.2d 907, 908 (Utah Ct. App. 1988); *Peterson v. Peterson,* 748 P.2d 593, 594 (Utah Ct. App. 1988).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[5]** In relation to the division of personal property, Anita notes that Eugene replaced furniture that was originally hers with new furniture. Anita then argues that the new furniture should be treated as her separate, premarital property because it replaced old furniture that was her separate property. No legal theory has been suggested to us to justify holding that a chair bought by Eugene becomes Anita's separate property due to the fact that it now stands where a chair owned by Anita once stood. Moreover, even if the replaced furniture had become Anita's separate property, it would nevertheless be subject to equitable division upon divorce, as we have noted above.

Finally, Anita questions the termination of **temporary alimony.** Judge Brian apparently based that termination on his finding that Anita was cohabiting with another man. Neither of the parties seriously disputes that, under Utah law, cohabitation warrants termination of alimony. *See* Utah Code Ann. § 30-3-5 (6) (1989). Rather, Anita's attack on the termination of alimony is simply an attack on the finding of cohabitation. However, in that attack, she wholly **[**6]** fails to take into account our standard of review. We do not reverse a trial court's finding of fact unless the appellant marshals all evidence relevant to the finding and then shows the finding to be clearly erroneous. n5 Anita has neither marshaled the relevant evidence nor shown the finding to be clearly erroneous. We therefore uphold the termination of **temporary alimony.**

- - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); *Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988).

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

ta's arguments on which this appeal is based are thus without merit. This was a frivolous appeal. n6 In :h a case, we may award double costs to the appellee. Utah R. App. P. 33(a).

- - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

Utah R. App. P. 33(b); *Eames v. Eames*, 735 P.2d 395, 398 (Utah Ct. App. 1987); *Porco v. Porco*, 752 d 365, 369 (Utah Ct. App. 1988); *cf. Maughan v. Maughan*, 770 P.2d 156, 162 (Utah Ct. App. 1989).

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

***7]** Affirmed, but remanded for taxing, under Utah R. App. P. 34, of twice the amount of costs incurred appeal.

man H. Jackson, Judge, John Farr Larson, Judge, concur.

Exhibit "B"

*734 P.2d 417, *; 45 Utah Adv. Rep. 17;*
*1986 Utah LEXIS 911, **

Rainer Frederick HUCK, Plaintiff and Appellant, v. Patricia Ann HUCK, Defendant and Respondent

No. 19180

Supreme Court of Utah

734 P.2d 417; 45 Utah Adv. Rep. 17; 1986 Utah LEXIS 911

November 4, 1986, Filed

CASE SUMMARY

OCEDURAL POSTURE: Plaintiff husband filed for divorce from defendant wife. The district court ah) invalidated the parties' prenuptial agreement and awarded the wife temporary support, tody of the parties' child, child support, and attorney fees. The husband appealed.

ERVIEW: During the parties' marriage, the wife's compensation from her employment was used ›ay household expenses. During the marriage, the husband acquired rental properties, which he chased with his own funds. In invalidating the prenuptial agreement, the district court found that wife was coerced into signing it because she was already pregnant and the wedding had already n planned. The husband argued that he was prejudiced by the invalidation of the prenuptial ɜement, as the wife had waived child support and alimony so long as she was capable of self-port at the time of the divorce. In affirming the decree, the court held that the prenuptial ɜement was properly invalidated, as it only attempted to limit child support if the parties divorced ıin two years; the parties divorced within four years of marriage, and the wife could not have ved the child's unalienable right to support. The court also held that the several rental properties were acquired after the marriage were properly awarded to the wife, as they were marital ›erty because they could not have been acquired by the husband without the wife's contribution ards household expenses.

COME: The court affirmed the decree that had been entered for the wife in the husband's divorce ›n.

E TERMS: marriage, prenuptial, divorce, child support, temporary alimony, rental properties, self-›ort, signing, alimony, separate property, decree, household, wedding, voiding, coerced, presented ɜnce, financial need, estopped, binding, division of property, personal property, personal expenses, erty acquired, marital property, ordered to pay, medical care, gross income, full credit, child care, ıdiced

CORE CONCEPTS - ◆ Hide Concepts

mily Law : Child Support : Collection & Enforcement
mily Law : Marital Duties & Rights : Premarital Agreements
agreement between spouses can act to deprive a child of the basic and unalienable right to child ›port since such right is vested in the minor.

nily Law : Divorce, Dissolution & Spousal Support : Collection & Enforcement
nily Law : Marital Duties & Rights : Premarital Agreements
agreement or stipulation between the parties as to alimony is not binding on the court but

serves only as a recommendation; it is within the court's power to modify such an agreement or stipulation at the time of the decree or subsequently.

Family Law : Child Support : Collection & Enforcement
Family Law : Divorce, Dissolution & Spousal Support : Collection & Enforcement
Family Law : Marital Duties & Rights : Premarital Agreements
In general, prenuptial agreements concerning the disposition of property owned by the parties at the time of their marriage are valid so long as there is no fraud, coercion, or material nondisclosure. However, provisions eliminating the payment of child support or alimony in prenuptial agreements are not binding on the court. This judicial discretion allows the parties freedom of contract while preserving the right of the state to insure adequate support for its citizens.

Civil Procedure : Costs & Attorney Fees : Attorney Fees
Family Law : Divorce, Dissolution & Spousal Support
In divorce cases, an award of attorney fees must be supported by evidence that it is reasonable in amount and reasonably needed by the party requesting the award.

Family Law : Divorce, Dissolution & Spousal Support : Collection & Enforcement
Family Law : Divorce, Dissolution & Spousal Support : Property Distribution
Utah Code Ann. § 30-3-5 (1953) provides that the court may make such orders in relation to the children, property, and parties as may be equitable.

COUNSEL: [1]**

Craig Cook for Plaintiff.

Roger Sandack for Defendant.

JUDGES: Howe, Justice. Gordon R. Hall, Chief Justice, Christine M. Durham, Justice, Michael D. Zimmerman, Justice. Stewart, Justice, concurs in the result.

OPINIONBY: HOWE

OPINION: [*418] Plaintiff appeals the property division and award of temporary support and attorney fees made in this divorce case.

The plaintiff, Rainer Huck, and the defendant, Patricia Huck, met and began dating in 1972 while doing graduate work at the University of Utah. During the course of their relationship, defendant became pregnant. Plaintiff suggested that she have an abortion. Defendant, however, wanted to marry plaintiff and give birth to the child. Plaintiff, somewhat reluctantly, agreed to the marriage, and plans were made for a wedding in April of 1975. On April 9, one day prior to the wedding, the parties signed a prenuptial agreement containing the following provisions:

> 1. All property owned by either party prior to the marriage shall remain the exclusive property and province of such person . . . .
>
> 2. [Sets out specific property of each brought into the marriage.]
>
> 3. . . . . [A] mutual agreement as to the disbursement of **[**2]** property acquired after the marriage shall be made by the parties themselves or in the event they cannot agree, that they shall allow a court of law to divide such property . . . .
>
> 4. . . . . Should divorce or legal separation proceedings be filed within two years from the undersigned date, Pat shall totally support any children . . . . provided, however, that in the event Pat is unable to support said children from her own income Rainer will assume all

responsibility and child support, even though any children remain in Pat's custody.

5. It is mutually agreed that neither party shall be responsible or liable for the other party's debts or obligations existing prior to marriage.

6. In the event of divorce or separation Pat specifically waives any alimony or support payments provided that she is capable of self-support at such time.

7. . . . . This document shall be interpreted under Utah Law . . . .

8. . . . . If such marriage does not take place then this agreement shall be null and void.

9. The parties hereby acknowledge that each of them has been represented by counsel of their choice and has been advised of their rights and liabilities . . . . **[**3]**

ring the marriage, defendant worked and attended school. She paid most of the household expenses, ıd, medical care and insurance, as well as child care and her own personal expenses. Plaintiff provided : house they lived in and paid the taxes thereon and the utilities except for electricity, which defendant d. He managed the rental properties he had acquired before the marriage and seven additional ıperties he acquired during the marriage. The property at 224 Iowa Street, Salt Lake City, was acquired funds contributed by both plaintiff and defendant, and title was taken as tenants in common. All other ıperties acquired during the marriage were either obtained by funds generated from the rental properties ıd title taken in plaintiff's name alone) or purchased jointly by plaintiff and his attorney.

April 1979, plaintiff filed for divorce. Defendant received temporary child support of $175 per month and **nporary alimony** of $75 per month during the pendency of the proceedings. The district court alidated the prenuptial agreement, finding that defendant had been coerced into signing it. Defendant ; awarded custody of their daughter, Sophy, and child support **[**4]** of $200 a month. Along with her arate personal property, she was also awarded real property located at 224 and 215 Iowa Street and ı Harmony Street in **[*419]** Salt Lake City, all of which were acquired during the marriage. Plaintiff ; ordered to pay defendant's attorney fees in the amount of $2,750. Plaintiff appeals, raising the ıwing issues:

ID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN FINDING THE PRENUPTIAL AGREEMENT VOID?

trial court found that defendant was coerced into signing the prenuptial agreement because she was ady pregnant and plans for the wedding had been made when she was asked to sign. However, the rt also found that invalidating the prenuptial agreement did not prejudice plaintiff. He contends that he prejudiced by the voiding of the prenuptial agreement in that he was ordered to pay child support and **ıporary alimony,** which defendant had waived in the agreement as long as she was capable of self- ıort at the time of a divorce. Because defendant had a gross income of $1,140 per month at the time of divorce, plaintiff contends that the court should have found her capable of self-support and that the re to do so, coupled **[**5]** with the voiding of the prenuptial agreement, prejudiced him in the ıunt of child support and **temporary alimony** he was required to pay.

agreement only attempted to limit defendant's right to child support in the event that divorce eedings were filed within two years of the signing of the agreement. The agreement was signed April 9, 5; plaintiff filed for divorce in April of 1979, four years later. Therefore, even had the agreement been rced by the trial court, it would not have had any effect on child support. In any event, no agreement ıeen the spouses could act to deprive the child of "the basic and unalienable right to child support, : such right is vested in the minor." *Reick v. Reick,* 652 P.2d 916, 917 (Utah 1982). *See Strong v. ng,* 548 P.2d 626 (Utah 1976).

ı **temporary alimony,** defendant waived her right to alimony in the agreement, "provided she was ble of self-support" at the time of the divorce. Defendant presented evidence that her expenses eded her income by $700. Thus, even under the terms of the prenuptial agreement, the trial court l have properly awarded **temporary alimony.** An agreement or stipulation between the parties

[6]** as to alimony is not binding on the court, but serves only as a recommendation; it is within the court's power to modify such an agreement or stipulation at the time of the decree or subsequently. *Callister v. Callister*, 1 Utah 2d 34, 37, 261 P.2d 944, 946 (1953).

Plaintiff does not claim that any other term of the agreement was unsatisfied or that he suffered any other prejudice by the court's failure to enforce the prenuptial agreement. This Court need not reach the issue of whether defendant was coerced into signing the agreement, since even if the trial court erred in so finding, the error was not prejudicial.

Although the validity of the agreement is not dispositive in this case, it should be noted that in general, prenuptial agreements concerning the disposition of property owned by the parties at the time of their marriage are valid so long as there is no fraud, coercion, or material nondisclosure. However, provisions eliminating the payment of child support or alimony in prenuptial agreements are not binding on the court. This judicial discretion allows the parties freedom of contract while preserving the right of the state to insure adequate support for its citizens. **[**7]** *Unander v. Unander*, 265 Or. 102, 506 P.2d 719, 722 (1973).

II. DID THE COURT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES?

In divorce cases, an award of attorney fees must be supported by evidence that it is reasonable in amount and reasonably needed by the party requesting the award. *Beals v. Beals*, 682 P.2d 862 (Utah 1984). Plaintiff contends that there is no evidence to support a finding of financial need on the part of defendant to justify the award of fees to defendant. He presented evidence that her total income from all **[*420]** sources, including support payments, totalled $1,795 per month and that therefore she should be capable of bearing the cost of litigation.

However, defendant had no liquid assets, and even using plaintiff's figures as to her gross income from all sources, her income barely covered her expenses. Her attorney testified at trial as to the reasonableness of the time spent and fees charged. The trial court awarded her less than one-third of the amount she sought. She met her burden of showing financial need and provided evidence that the fees assessed to plaintiff ($2,750) were reasonable.

III. DID THE COURT ERR IN AWARDING CERTAIN REAL PROPERTY **[**8]** ACQUIRED DURING THE MARRIAGE TO DEFENDANT?

Plaintiff contends that all properties acquired during the marriage (except 224 Iowa Street) should be deemed his "separate property" and that defendant should be estopped from claiming any interest in 215 Iowa Street and 629 Harmony Street, which were awarded to her. U.C.A., 1953, § 30-3-5 provides that the court may make "such orders in relation to the children, property and parties . . . . as may be equitable."

Plaintiff's attempt to classify all properties acquired during the marriage as his separate property is of no avail. The fact that title was not in their joint names and that the properties were purchased with funds generated from his other rental properties is not determinative of the distribution to be made.

The trial court properly looked to the contributions of the parties during the marriage. Plaintiff's only income was derived from the rental properties he owned and managed. Defendant, though attending school, was employed and paid most of the household expenses, food, medical care, and insurance, as well as child care and her own personal expenses. While plaintiff used his income to acquire additional properties, defendant's **[**9]** funds were consumed in supporting the parties and their child. The trial court was correct in holding that the properties were marital property that could not have been acquired by plaintiff without defendant's contribution toward household expenses.

The voiding of the prenuptial agreement did not in any way affect the division of property made by the court. As per the terms of the agreement, plaintiff was awarded all real properties he owned prior to the marriage. He also received the increase in value of those properties from amounts expended during the marriage to improve them and reduce or retire mortgages. Plaintiff's argument that all properties acquired during the marriage should be considered his separate property because the down payments came from his separate funds is not persuasive. The prenuptial agreement provided that property acquired during the

arriage should be divided by the court. The three properties awarded to defendant were acquired during e marriage. However, plaintiff was given full credit for the cash and personal property he brought into the arriage in the sum of $15,000, part of which ($3,000) he used as a down payment on the 629 Harmony eet property. **[**10]** The decree awarded him $19,000 in cash from the sale proceeds of the Harvard eet property which the parties sold prior to their separation, $1,600 from the sale of a boat, and a ,000 note, in addition to his car, motorcycles, and laboratory equipment. In addition to giving plaintiff full dit for his premarital $15,000, the court awarded him the long half of the marital property. The division property properly considered the contribution of the parties and the needs they will have in adjusting to ir new situation.

ere is no merit to plaintiff's contention that defendant should be estopped from claiming any interest in properties acquired during the marriage. Plaintiff points to several occasions when defendant stated she nted nothing to do with the properties and claimed no interest therein. However, since the prenuptial eement clearly gave her an interest, plaintiff could **[*421]** not have reasonably relied on her tuitous oral disclaimers.

ree affirmed. Costs to defendant.

CONCUR: Gordon R. Hall, Chief Justice, Christine M. Durham, Justice, Michael D. Zimmerman, Justice.

wart, Justice, concurs in the result.

Exhibit “C”

*704 P.2d 564, *; 1985 Utah LEXIS 857, ***

Linda M. OLSON, Plaintiff and Appellant, v. Kenneth C. OLSON, Defendant and Respondent

No. 19280

Supreme Court of Utah

704 P.2d 564; 1985 Utah LEXIS 857

August 2, 1985, Filed

CASE SUMMARY

)CEDURAL POSTURE: Plaintiff wife filed a divorce proceeding against defendant husband. The court (Utah) distributed the property and awarded **temporary alimony.** The wife appealed.

:RVIEW: Throughout the marriage, the wife did not work, but she cared for the parties' six lren. Although the husband had a history of earning good income, he was without a job at the of the trial. In a post-trial proceeding, the trial court sua sponte raised the issue of whether ony should only be temporary and ordered that the award terminate after 2 years. First, the wife ed that the amount of alimony awarded was insufficient, as it did not reflect the husband's rical earnings. In affirming the decree, the court held that the trial court's consideration of the and's past income was evidenced by the fact that alimony and child support were awarded ite the fact that the husband was without income. Secondly, the wife argued that the trial court d in awarding temporary rather than permanent alimony. The court modified the decree, finding the **temporary alimony** award was a clear and prejudicial abuse of discretion. Because the wife not worked since the birth of her first child, it was unreasonable to believe that she would have d work sufficient to support herself and her remaining three children within two years of the ee.

COME: In the wife's divorce proceeding against the husband, the court modified the divorce ee to provide for permanent alimony and affirmed the decree as modified.

E TERMS: alimony, marriage, earning, financial condition, decree of divorce, decree, consulting ness, standard of living, earning capacity, time of trial, abuse of discretion, permanent alimony, living nses, minor children, current income, alimony award, consulting, modified, divorce, enjoyed, modify, dicial abuse of discretion, equitable, continuing jurisdiction, financial declaration, retirement account, y to support, ability to provide, minimum wage, high school

CORE CONCEPTS - ◆ Hide Concepts

il Procedure : Appeals : Standards of Review : Abuse of Discretion
nily Law : Child Support : Collection & Enforcement
nily Law : Divorce, Dissolution & Spousal Support : Obligations
nily Law : Divorce, Dissolution & Spousal Support : Property Distribution
granting a divorce, the trial court may make such orders in relation to the children, property, and ties, and the maintenance and health care of the parties and children, as may be equitable. Utah le Ann. § 30-3-5 (1984).The reviewing court will not disturb the trial court's distribution of perty and award of alimony in a divorce proceeding absent a clear and prejudicial abuse of retion.

Family Law : Divorce, Dissolution & Spousal Support : Obligations

An alimony award should, as far as possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage. In determining the amount of alimony to be awarded, it was necessary for the trial court to consider the financial condition and needs of the plaintiff, her ability to produce a sufficient income for herself, and the ability of the defendant to provide support.

Family Law : Divorce, Dissolution & Spousal Support : Obligations

Where the husband has experienced a temporary decrease in income, his historical earnings must be taken into account in determining the amount of alimony to be paid.

COUNSEL: [1]**

John G. Marshall, Salt Lake City; Kenton W. Willis, Salt Lake City, for Plaintiff.

Mary Lou Godbe, Salt Lake City, for Defendant.

JUDGES: Hall, Chief Justice, wrote the opinion. We concur: I. Daniel Stewart, Justice, Richard C. Howe, Justice, Christine M. Durham, Justice, Michael D. Zimmerman, Justice.

OPINIONBY: HALL

OPINION: [*565] Linda M. Olson, plaintiff, appeals from the property distribution and alimony provisions of a decree of divorce. She contends the trial court erred in awarding an insufficient amount of alimony, in ordering that alimony terminate after two years, and in failing to treat defendant's earning capacity as an asset in dividing the marital property. We reject the contentions regarding the property division and the amount of alimony, but hold that the trial court abused its discretion in failing to award permanent alimony. Thus, we modify the decree to provide for permanent alimony, as further explained below, and affirm the decree as modified.

The parties were married in December 1960. The decree of divorce was entered in May 1983, after the parties had been separated about two years. They had six children, three of whom were minors, aged 16, 11, and 3, **[**2]** at the time of the divorce.

At the time of the marriage, the plaintiff was eighteen and worked as a typist, having recently graduated from high school. Six months after the marriage, she quit her job because of pregnancy. She was not again employed outside the home until after the parties separated, when she worked for minimum wage as a part-time, temporary department store clerk during the Christmas season.

The defendant worked and supported the family during the marriage. He formed a consulting business and provided consulting services to governmental agencies on a contract basis. His income fluctuated depending on his current contracts. His gross income was $76,485 in 1980, $62,603 in 1981, and $57,000 for the first nine months of 1982. At the time of trial, the defendant had no consulting contracts in force and no current income. He was negotiating a contract, which he expected to obtain, that would bring $3,500 a month for the remainder of 1982.

During the marriage, the parties acquired a home, in which their equity at the time of trial was $137,000 according to the plaintiff's estimate and $206,000 according to the defendant's estimate. The defendant also acquired **[**3]** a retirement account during the marriage worth $15,359 at the time of trial.

The plaintiff filed a financial declaration showing monthly living expenses of $5,500 for the entire family before the separation. She estimated the future living expenses for herself and the three minor children to be $4,200 per month. The defendant filed a financial declaration showing his monthly expenses to be $2,837.

After trial, the trial court issued a memorandum decision providing, among other things, that the defendant pay the plaintiff $1,600 per month as alimony. In a post-trial proceeding, the court *sua sponte* raised the

ue whether the alimony should be paid for only a limited time. The court rejected the suggestion of the fendant's counsel that alimony be paid for ten years. Suggesting instead a term of two years, the court ted:

> I think she's got to get out and take care of herself. She just cannot sit back and get $1,600 a month from this fellow and do nothing to help support herself. Society doesn't tolerate that from any of us. That's why we are all employed. And she has just the same obligations to take care of herself as we all have. **[*566]**

e decree **[**4]** of divorce granted to the plaintiff alimony of $1,600 per month for a period of two ars. The decree granted custody of the three minor children to the plaintiff and ordered the defendant to / $200 per month per child as child support. The decree awarded each party one-half the equity in the me, payable upon sale of the home, and ordered that the home be sold when the oldest child in the intiff's custody reached eighteen years of age or when the plaintiff cohabited or remarried, whichever urred first. Each party was awarded an automobile and his or her personal effects. The plaintiff was arded the contents of the home. The defendant was awarded his consulting business, his retirement ount and a gymnasium membership.

n granting a divorce, the trial court may make "such orders in relation to the children, property and ties, and the maintenance and health care of the parties and children, as may be equitable." U.C.A., 53, § 30-3-5 (1984 ed.). This Court will not disturb the trial court's distribution of property and award of mony in a divorce proceeding absent a clear and prejudicial abuse of discretion. n1

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

Higley v. Higley, Utah, 676 P.2d 379, 382 (1983); *Dority v. Dority,* Utah, 645 P.2d 56, 59 (1982) ations omitted); *English v. English,* Utah, 565 P.2d 409, 410 (1977).

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**5]**

ressing first the plaintiff's challenge to the amount of alimony awarded, we find no abuse of discretion. n alimony award should, as far as possible, equalize the parties' respective standards of living and ntain them at a level as close as possible to the standard of living enjoyed during the marriage. n2 In ermining the amount of alimony to be awarded, it was necessary for the trial court to consider the ncial condition and needs of the plaintiff, her ability to produce a sufficient income for herself, and the ty of the defendant to provide support. n3

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

Higley, supra note 1, at 381; *English, supra* note 1 at 411.

See *Jones v. Jones,* Utah, 700 P.2d 1072, 1075 (1985); *Higley, supra* note 1, at 381 (citation omitted); *lish, supra* note 1 at 411-12 (footnote omitted).

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

plaintiff contends the trial court failed to consider these factors in setting the amount of alimony in this . More specifically, she asserts the trial court failed to consider the defendant's **[**6]** ability to ide support as shown by his historical earnings rather than his current income.

ave held that where the husband has experienced a temporary decrease in income, his historical ings must be taken into account in determining the amount of alimony to be paid. n4 Contrary to the ntiff's contention here, however, the record reflects the trial court's consideration of the defendant's rical earnings in setting the amount of alimony. In comparison to the defendant's earnings at the time ial, the amount of support awarded itself reflects a consideration of the defendant's past earnings: ite the defendant's total lack of current income, the court ordered him to pay $1,600 per month in ony and $2,200 per month in total family maintenance. Moreover, the court's findings of fact include

determinations of the defendant's past earnings, again showing a consideration of this factor.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 *English, supra* note 1, at 412; *Westenskow v. Westenskow,* Utah, 562 P.2d 1256, 1257 (1977).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**7]**

The plaintiff next argues that the trial court did not consider the realistic limitations on her earning ability in establishing the amount of alimony. To the contrary, the findings of fact reflect that the court analyzed the plaintiff's current ability to support herself and found it very limited. The findings state that "plaintiff is in need of alimony to maintain and support herself as she is not working, has been able to secure only minimum wage jobs and testified that because of her emotional state and her parental duties for her children, she could not currently maintain any employment."

Clearly, then, the trial court considered both the second and third factors in the above three-part analysis in determining **[*567]** the amount of alimony in this case. The record contains only scant indication, however, of the court's consideration of the first of the three factors, the financial condition and needs of the wife. The findings of fact contain only the conclusory finding that "plaintiff is in need of alimony," and, in a discussion on the record, the court generally described the parties' joint financial condition as an "economic disaster."

Turning to the record in the **[**8]** absence of sufficient findings, we find conflicting evidence on some factual issues material to a determination of the wife's financial condition and needs. Nevertheless, even accepting as true, for purposes of review, the wife's evidence on these issues, we find no abuse of discretion in the amount of alimony awarded. The undisputed facts, taken with the plaintiff's evidence on disputed facts, establish that the plaintiff's only substantial asset is her share of the equity in the marital home, worth about $68,500, and that, to maintain the standard of living they enjoyed during the marriage, the living expenses of the wife and the three minor children would be $4,200 per month.

Considering the plaintiff's financial condition and needs, as established by the evidence most favorable to her, in conjunction with her ability to support herself and the defendant's ability to provide support, as found by the trial court, the award of $1,600 per month in alimony was within the court's sound discretion. While the alimony award was far below the total amount required to maintain the wife at the standard of living she enjoyed during the marriage, it is reasonable in light of the limited **[**9]** family resources available to fulfill her needs. Thus, we find no abuse of discretion. Should the relevant circumstances change in the future, the wife may petition the court for modification of the amount of alimony under the court's continuing jurisdiction. n5

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 See, U.C.A., 1953, § 30-3-5 (1984 ed.).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

We agree, however, with the plaintiff's contention that the court's order that alimony terminate after two years was a clear and prejudicial abuse of discretion. As we stated in *Jones v. Jones,* n6 "this is simply not the sort of situation in which a decreasing rehabilitative alimony award is appropriate." n7 Married soon after graduating from high school, the plaintiff's primary occupation during the twenty-odd year marriage, was caring for the parties' home and six children. Having worked only minor clerical jobs for two brief periods over twenty years apart, she has no reasonable expectation of obtaining employment two years hence that will enable her to support herself at a standard of living even **[**10]** approaching that which she had during the marriage. n8 Continuing spousal maintenance is mandated by these circumstances. Therefore, under our discretionary power to modify the final decree in a divorce action, n9 we hereby modify the decree of divorce in this case to provide for permanent alimony from defendant to plaintiff. Again, should the circumstances change in the future, the defendant may petition the court to modify the decree under its continuing jurisdiction. n10

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

Supra note 3.

Id. at 1076.

See *id.*

Higley, supra note 1 at 382; *Read v. Read,* Utah, 594 P.2d 871, 873 (1979).

See, *supra* note 5.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

ılly, the plaintiff challenges the property distribution on the ground that she was not awarded either a re of the present value of the defendant's earning capacity, or additional property in compensation for award of the defendant's consulting business to him.

award of alimony, as modified by this opinion, duly considers and in fact is **[**11]** based upon the ıing capacity of the defendant which clearly equates with his ability to pay alimony. No evidence was ıced at trial to establish any value attributable to the consulting business, and plaintiff concedes that award of the **[*568]** business to defendant was proper because the value of the business consists of defendant's personal ability to perform consulting services.

earning capacity of the defendant having been fully considered and taken into account in arriving at an table divorce settlement, we affirm the decree of divorce, except as to the provision for alimony ified by this opinion.

CONCUR: I. Daniel Stewart, Justice, Richard C. Howe, Justice, Christine M. Durham, Justice, Michael D. nerman, Justice.

Exhibit “D”

*676 P.2d 379, *; 1983 Utah LEXIS 1231, ***

Monte Ray HIGLEY, Plaintiff and Respondent, v. Geraldine Wright HIGLEY, Defendant and Appellant

No. 18970

Supreme Court of Utah

676 P.2d 379; 1983 Utah LEXIS 1231

December 19, 1983, Filed

CASE SUMMARY

)CEDURAL POSTURE: Appellant wife sought review of the decision from the trial court (Utah), :h granted a divorce to appellee husband and the wife, divided their property almost equally, and rded the wife **temporary alimony** for three years and a reduced amount as permanent alimony. wife contented that the trial court abused its discretion in awarding alimony.

:RVIEW: The parties were granted a divorce. The trial court divided their property almost equally, rded the wife **temporary alimony** for three years and awarded her permanent alimony of $ 100)nth thereafter. The wife claimed that the trial court abused its discretion in awarding alimony. :al, the court affirmed the trial court's **temporary alimony** award but reversed its award of ıanent alimony. The court held that: (1) where the wife had no present or prospective permanent ne other than the $ 100 per month permanent alimony award, her living expenses exceeded $ per month, she was 47 years old and in very poor health, and she spent most of the prior 30 s as a full-time homemaker and caretaker of five children, the trial court's award fell far short of iding the wife a standard of living approximating that which she enjoyed during the marriage; (2) ı the foregoing considerations, the trial court abused its discretion in failing to make findings rding the wife's ability to work; and (3) because the record was inadequate for the court to ify the decree, it was necessary to remand the alimony award for additional findings and possible ification.

COME: The court affirmed the trial court's award of **temporary alimony** but reversed its award :rmanent alimony. The court held that the absence of a specific finding regarding the wife's ent or future ability to work, the trial court's $ 100 per month permanent alimony award was an e of discretion. The court remanded the permanent alimony award for additional findings and ible modifications.

E TERMS: ability to work, permanent alimony, alimony award, marriage, alimony, welding, earning, age, stomach, standard of living, temporary alimony, modification, divorce, enjoyed, decree, woman, dicial abuse of discretion, support and maintenance, divorce proceeding, sufficient income, mental h, high school, set forth, self-supporting, contributed, three-year, rebuild, modify, career, outlet

CORE CONCEPTS - ◆ Hide Concepts

nily Law : Divorce, Dissolution & Spousal Support : Obligations

: criteria in determining a reasonable award for support and maintenance include the financial ditions and needs of the wife, the ability of the wife to produce a sufficient income for herself; l the ability of the husband to provide support.

nily Law : Divorce, Dissolution & Spousal Support : Obligations

- An alimony award should, in as far as possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage.

Family Law : Divorce, Dissolution & Spousal Support : Obligations

- An appellate court will not disturb the trial court's distribution of property and award of alimony in a divorce proceeding unless a clear and prejudicial abuse of discretion is shown.

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

Family Law : Divorce, Dissolution & Spousal Support : Obligations

- When an appellate court determines that a trial court's alimony award is a clear and prejudicial abuse of discretion, the appellate court may either make a modification in the decree or remand for entry of a modified judgment by the trial court. Utah Const. art. VIII, § 9.

COUNSEL: [1]**

C. Gerald Parker, Ogden, Utah, for Plaintiff.

Darrell G. Renstrom, Ogden, Utah, for Defendant.

JUDGES: Durham, Justice, wrote the opinion. I. Daniel Stewart, Justice, Dallin H. Oaks, Justice, Richard C. Howe, Justice, concur. Hall, Chief Justice, dissents by separate opinion.

OPINIONBY: DURHAM

OPINION: [*380] The trial court in this action granted a divorce to each party, divided their property almost equally, awarded the appellant **temporary alimony** for three years in an amount equivalent to the house and utilities payments and awarded the appellant permanent alimony thereafter of $100 per month. The appellant claims that the trial court abused its discretion in the granting of a divorce to respondent and in the awarding of alimony. Her first argument is without merit, but we reverse and remand that portion of the decree dealing with alimony. This Court has set forth numerous criteria to be used in determining a reasonable alimony award. In light of our precedents and the absence of a specific finding regarding the appellant's present or future ability to work, the trial court's $100 per month permanent alimony award was, in our opinion, an abuse of discretion. Although we affirm **[**2]** the **temporary alimony** award, we reverse and remand the permanent alimony award for additional findings and possible modification.

In *MacDonald v. MacDonald,* 120 Utah 573, 236 P.2d 1066 (1951), this Court set forth fifteen factors that may be considered in adjusting the rights and obligations of the parties in a divorce proceeding. In light of these factors, the relevant facts in the present case are as follows: The parties began their 30-year marriage when the respondent was 19 and the appellant was 17. The respondent has an eleventh-grade education, and his income is approximately $1,200 (net) per month plus potential income from occasional welding jobs. The appellant has a high school degree and no income. Their property consists of $62,200 equity in a home valued at $69,500, welding equipment worth $4,000, several older model motor vehicles and household furnishings and effects. This property was acquired through their joint efforts. The respondent contributed his income and his labor, and the appellant contributed her labor. She helped build and run the respondent's private welding business, and her homemaking and childrearing efforts facilitated the respondent's pursuit **[**3]** of his career. The five children of the parties are all adults now and, although two still live with their mother, they are all self-supporting. At his current age of 49, the respondent is in good physical and mental health. Although the 47-year-old appellant is in good mental health, her physical health is very poor. In 1972, she had an operation for pyloric gastrectomy and hiatal hernia **[*381]** necessitating the removal of three-fourths of her stomach. In 1973, she had a hysterectomy due to hemorrhaging and potassium shock. In 1975, she underwent an operation to remove blockage and to rebuild the outlet to her stomach. Eighteen days later another operation for intestinal blockage was performed. At the present time, she is in need of further surgery for blockage and to rebuild the outlet to her stomach. In the future, she may need a series of further operations for similar problems.

Both parties were satisfied with their marriage for many years, but the divorce came about when the

)ondent became unhappy with the marriage and became involved with another woman. Both parties
le sacrifices during the marriage. The respondent worked two jobs to provide for his family, **[**4]**
le the appellant managed the home and cared for their children, thereby foregoing employment
erience and benefits. The record indicates both parties have approximately equal living expenses of
ut $800 per month, and these amounts would be sufficient to maintain each of them at approximately
standard of living they enjoyed during their marriage.

ı respect to alimony and child support, this Court has stated that the

> . . . . criteria in determining a reasonable award for support and maintenance include the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself; and the ability of the husband to provide support.

lish v. English, Utah, 565 P.2d 409, 411-412 (1977) (footnote omitted). In the present case, the
ellant has no present or prospective permanent income other than the $100 per month permanent
ony award, whereas her living expenses exceed $800 per month. She is a 47-year-old woman in very
- health, who has spent most of the last 30 years of her life as a full-time homemaker and caretaker of
children. Her efforts as homemaker have enabled the respondent to build **[**5]** a career as an
-aft welder. It is highly unlikely that the appellant will be able to produce sufficient income for herself.
has no employment training or experience other than a few sporadic, seasonal, unskilled jobs. Given
health problems, it is questionable whether she will be able to obtain and maintain full-time
loyment. Even if she does find work her earning potential is very low. The following statistics provide
ght into the economic reality of the appellant's situation: In 1981, the median income for a woman in
United States with a high school education was $6,495 per year. *See* Bureau of the Census, U.S.
artment of Commerce, Current Population Reports, Series P-60 No. 137, *Money Income of Households,*
ilies, and Persons in the United States: 1981, Table 37 (Washington, D.C., 1983). Another study
als that, overall, women's earnings in the United States average $ .59 for every $1 earned by men.
Bureau of Labor Statistics, U.S. Department of Labor, Report 673, *The Female - Male Earnings Gap: A*
ew of Employment and Earnings Issues, Table 6 (Washington, D.C., September, 1982). Moreover,
use the appellant has no **[**6]** previous work history her projected earnings may in fact be even
r than the above figures. This is in striking contrast to the respondent's annual gross income of
356.80, which he can supplement with additional income from his welding business. Certainly the
ondent has the ability to provide permanent support for the appellant in an amount greater than $100
nonth should her needs so warrant.

alimony award should, in as far as possible, equalize the parties' respective standards of living and
tain them at a level as close as possible to the standard of living enjoyed during the marriage. Given
small amount of income that the appellant realistically will be able to earn, the $100 per month alimony
d will not afford her a standard of living anywhere near that which she enjoyed during the marriage or
that of the respondent. In fact, the appellant could well be forced to resort to public assistance unless
actual earnings exceed the statistical probabilities. **[*382]** The alimony award in the present case
far short of serving the most important function of alimony under the *English* standard, *supra.*

applicable standard of **[**7]** review has been previously set forth by this Court as follows:

> It is well settled that this Court will not disturb the trial court's distribution of property and award of alimony in a divorce proceeding unless a clear and prejudicial abuse of discretion is shown.

y v. Dority, Utah, 645 P.2d 56, 59 (1982) (citations omitted). The trial court made no findings
ding the appellant's ability to work. n1 Given the considerations set forth above and the absence of a
ıg regarding the appellant's actual ability to work now or in three-years' time, we believe the trial
's award to the appellant of $100 per month permanent alimony is a clear and prejudicial abuse of
etion. When such a determination is made, this Court may either make a modification in the decree
mand for entry of a modified judgment by the trial court. Utah Const. Art. VIII, Sec. 9; *Read v. Read,*

Utah, 594 P.2d 871 (1979); *Humphreys v. Humphreys*, Utah, 520 P.2d 193 (1974). In the present case, the record is inadequate for this Court to modify the decree because the trial court made no findings regarding the appellant's ability to work.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 In addressing the appellant's ability to work, the trial court in comments from the bench observed that "most people with her health problems work." However, no finding appears in the record about *appellant's* ability to work. Such a finding is critical in view of the fact that appellant would have to show substantial "change" in her circumstances if she seeks an increase in her award in the future. Without a specific finding on her ability to work based on her present health, any future court reviewing the question will be without a "baseline" determination with which to compare her future circumstances.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - **[**8]**

On the record before us, it appears that the appellant's health problems will greatly restrict her employability. On remand, the trial court must consider whether the appellant has the ability to earn enough to supplement the permanent alimony award to a level consistent with the guidelines set forth by this Court for determining a reasonable alimony award. If the trial court finds that the appellant does not have this ability, then it should modify its award of permanent alimony accordingly. If the trial court believes that the appellant does have this ability, then it should make such a finding of fact. Absent a finding regarding the appellant's ability to work, the appellant would be precluded in the future from asking the court to modify her alimony award based on changed circumstances if she can show in the future that she is unable to work.

In light of the facts of this case, the factors that must be considered in determining an alimony award, the criteria for determining a reasonable alimony award and the absence of a finding regarding the appellant's ability to work, we affirm the trial court's **temporary alimony** award, but reverse the permanent alimony award and remand **[**9]** that portion of the judgment to the trial court for additional findings and possible modification.

WE CONCUR: I. Daniel Stewart, Justice, Dallin H. Oaks, Justice, Richard C. Howe, Justice.

DISSENTBY: HALL

DISSENT: HALL, Chief Justice: (Dissenting)

An examination of the record beyond the formal findings of the trial court reveals the reasonableness of the court's decision to limit future alimony to $100 per month.

It lies well within the discretion of the trial court to enter such orders as will assist the parties in the adjustment to single life. In this instance, the court did just that by encouraging the appellant to become basically self-supporting over a period of three years.

The opinion of the Court criticizes the award of alimony as having been made without a finding as to appellant's future needs. However, such a finding was neither appropriate nor required. U.C.A., 1953, § 30-3-5 vests the court with continuing jurisdiction to make subsequent changes or new orders with respect to support and maintenance based upon a change **[*383]** of circumstances. Consequently, there is no need for speculation about the future needs of the parties.

The facts of this case reasonably **[**10]** support the conclusion reached by the trial court that the state of appellant's health was not such as would preclude her from earning a livelihood. This Court's conclusion to the contrary constitutes nothing more than an unwarranted substitution of its judgment for that of the trial court. In any event, at the expiration of the three-year period, should circumstances then exist requiring a further need for support, under the provisions of U.C.A., 1953, § 30-3-5, *supra,* further relief could then be sought.

I would affirm the judgment in its entirety.

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